

TIMOTHY S. LEIMAN, Ill. Bar No. 6270153
Email: leimant@sec.gov
DANIEL J. HAYES Ill. Bar No. 6243089
Email: hayesdj@sec.gov
PETER SENECHALLE, Ill Bar No. 6300822
Email: senechallep@sec.gov

175 West Jackson Boulevard, Suite 1450
Chicago, Illinois 60604
Telephone: (312) 353-7390
Facsimile: (312) 353-7398

LOCAL COUNSEL

Lynn M. Dean, Cal. Bar No. 205562
Email: deanl@sec.gov
United States Securities and Exchange Commission
444 S. Flower Street, Suite 900
Los Angeles, California 90071
Telephone: (323) 965-3998
Facsimile: (213) 443-1904

Attorneys for Plaintiff
United States Securities and Exchange Commission

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

SECURITIES AND EXCHANGE COMMISSION.

Plaintiff,

vs.

JAMMIN' JAVA CORP., dba MARLEY COFFEE, SHANE G. WHITTLE, WAYNE S. P. WEAVER, MICHAEL K. SUN, RENE BERLINGER, STEPHEN B. WHEATLEY, KEVIN P. MILLER, MOHAMMED A. AL-BARWANI, ALEXANDER J. HUNTER, and THOMAS E. HUNTER.

Defendants.

Case No. 2:15-CV-08921 SVW (MRWx)

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S REPLY
BRIEF IN SUPPORT OF MOTION
FOR INJUNCTIVE AND MONETARY
RELIEF**

Hearing Date: September 11, 2017
1:30 PM

Hon. Stephen V. Wilson
Courtroom 10A

Defendant Wayne Weaver asks this Court for a slap on the wrist. The SEC has established – through undisputed evidence – that Weaver earned massive profits from his fraud and his illegal, unregistered sale of Jammin Java stock. The scheme was immense: Weaver and his co-Defendants earned \$77.6 million from their illegal stock sales. Through its accountant, Kevin Barrett, the SEC has shown that Weaver received \$26,371,585.20 of those proceeds into his personal and entity accounts and that he controlled or helped dissipate \$21,070,516.34 more. Weaver does not dispute Mr. Barrett’s calculations or refute the SEC’s other evidence. Yet, Weaver asks that the Court allow him to keep all of his gains and order a civil penalty of only \$300,000. Weaver (1) argues that a recent Supreme Court decision overrules decades of Ninth Circuit precedent authorizing courts to order disgorgement (despite the Supreme Court’s express warning to the contrary), (2) tries to avoid liability by hiding behind the opaque financial structures he helped build, and (3) contends that the SEC’s penalty is excessive (even though the penalty is tied to his ill-gotten gains). Weaver’s attempt to dodge liability has no merit. The Supreme Court has left Ninth Circuit precedent allowing disgorgement intact, Weaver’s profits (including funds he helped dissipate) can be disgorged, and Weaver’s egregious conduct warrants a penalty equal to his massive illicit gains.

DISCUSSION

I. The Supreme Court's *Kokesh* Opinion Does Not Bar A Disgorgement Remedy.

In finding Weaver liable, this Court held that Weaver’s sales of Jammin Java stock were illegal – because they were unregistered and because they were part of his fraudulent scheme. (Dkt. #215 at 5-7.) The Court further found that Weaver “made millions of dollars in profit” from his illegal stock sales. (*Id.* at 7.) Indeed, the SEC has supplied unrefuted evidence that: (a) Weaver’s entities reaped over \$22.8 million in profits from illegal Jammin Java sales, (b) Weaver received \$3.56 million in cash from his nominees derived from their Jammin Java sales, (c) Weaver had a direct role in the transfer of almost \$13.3 million into gold Kruggerrand and a Dubai shell company to

1 evade law enforcement, and (d) entities owned by Weaver’s nominees held almost \$7.8
 2 million of Jammin Java profits when the scheme ended. (Dkt. #221 at 11-18.)

3 For almost 30 years – and as recently as June 7, 2017 – the Ninth Circuit has held
 4 that courts can order defendants like Weaver to disgorge profits from their securities
 5 law violations. *See, e.g., SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1096
 6 (9th Cir. 2010); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990); *SEC v. Fujinaga*, 2017
 7 WL 2462815, *2 (9th Cir. June 7, 2017) (affirming district court’s order requiring
 8 defendant to pay \$442.2 million in disgorgement). That is consistent with the
 9 overwhelming weight of authority nationwide.¹ Weaver – hoping to keep his vast illicit
 10 gains – asks this Court to be the first to depart from that precedent. He contends that the
 11 Supreme Court’s recent decision in *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), implicitly
 12 overturned decades of case law and bars courts from ordering disgorgement. But, the
 13 *Kokesh* Court did no such thing. To the contrary – in a footnote that Weaver quotes (but
 14 misapplies) – the Supreme Court expressly refused to address the issue Weaver now
 15 raises. And, even if the *Kokesh* Court had not expressly limited its holding, Weaver’s
 16 argument falls short because *Kokesh*’s finding that disgorgement is a “penalty” for
 17 purposes of the 28 U.S.C. § 2462 (“Section 2462”) statute of limitations does not
 18 deprive this Court of the equitable authority to order the return of illicit profits.

19 **A. The *Kokesh* Court Disclaimed Any Intent to Overrule Precedent Regarding**
 20 **District Courts’ Authority to Order Disgorgement.**

21 Weaver’s application of *Kokesh* has a fatal flaw: the Supreme Court expressly
 22 disclaimed any intent to overrule existing precedent regarding courts’ equitable power
 23 to order disgorgement. The *Kokesh* Court expressly warned that “[n]othing in this
 24 opinion should be interpreted as an opinion on whether courts possess authority to order

25
 26 ¹ *See, e.g., SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004); *SEC v. Frohling*, 851 F.3d 132, 139 (2d Cir. 2016); *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985); *SEC v. Lipson*, 278 F.3d 656, 662-63 (7th Cir. 2002); *SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990); *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004); *SEC v. Whittemore*, 659 F.3d 1, 11-12 (D.C. Cir. 2011).

1 disgorgement in SEC enforcement proceedings.” *Kokesh*, 137 S. Ct. at 1642 n.3. The
 2 Supreme Court further cautioned that it was deciding only “whether disgorgement, as
 3 applied in SEC enforcement actions, is subject to § 2462’s limitations period.” *Id.* The
 4 *Kokesh* Court could not have been clearer: it decided only the narrow issue before it.

5 Courts have taken the Supreme Court at its word, reasoning that “*Kokesh*’s
 6 holding cannot be plucked from the statutory context that gives it force.” *SEC v.
 7 Brooks*, 2017 WL 3315137, *8 (S.D. Fla. Aug. 3, 2017); *see also FTC v. DIRECTV,
 8 Inc.*, 2017 WL 3453376, at *5 (N.D. Cal. Aug. 12, 2017) (noting that *Kokesh* “explicitly
 9 declined to make any finding whatsoever” regarding courts’ authority to order
 10 disgorgement, and declining to “apply *Kokesh* to make broad generalizations” regarding
 11 requests for equitable relief). Because the Supreme Court declined to disturb existing
 12 case law recognizing disgorgement, Ninth Circuit precedent – embodied in cases like
 13 *Platforms Wireless* – remains binding on this Court. Weaver’s request that the Court
 14 deviate from that precedent (and allow him to keep his illicit profits) should be denied.²

15 **B. *Kokesh* Does Not Otherwise Invalidate Ninth Circuit Law On Disgorgement.**

16 Even if the Supreme Court had not expressly limited the scope of its *Kokesh*
 17 decision, there is little basis for this Court to extend it. Weaver argues that, when a
 18 remedy is deemed a “penalty” for statute of limitations purposes, it cannot be ordered as
 19 equitable relief. But, *Kokesh*’s holding that “SEC disgorgement constitutes a penalty
 20 within the meaning of Section 2462,” 137 S. Ct. at 1643 (emphasis added), should not
 21 be understood to mean that disgorgement is a “penalty” for all purposes or that the
 22 fundamental, equitable nature of the remedy has suddenly changed.

23 As the Supreme Court has cautioned: “The tendency to assume that a word which
 24 appears in two or more legal rules, and so in connection with more than one purpose,
 25

26 ² As *Kokesh* leaves existing precedent in place, Weaver would be left to argue that this Court should
 27 ignore binding Ninth Circuit cases because the Supreme Court may, sometime in the future, eliminate
 28 the disgorgement remedy. But, district courts should not deviate from binding authority based on
 predictions regarding future appellate decisions. *See, e.g., Donohoe v. Consol. Operating & Prod.
 Corp.*, 30 F.3d 907, 910 (7th Cir. 1994).

1 has, and should have precisely the same scope in all of them runs all through legal
 2 discussions. It has all the tenacity of original sin and must constantly be guarded
 3 against.” *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 328 (1961).

4 In the brief time since *Kokesh*, one court already has applied that warning,
 5 holding that the designation of disgorgement as a “penalty” for Section 2462 purposes
 6 does not mean that it is a “penalty” for other purposes. In one of the first opinions
 7 construing *Kokesh*, the district court in *SEC v. Brooks*, 2017 WL 3315137 (S.D. Fla.
 8 Aug. 3, 2017) addressed whether disgorgement is “remedial” or “penal” in determining
 9 whether a claim can survive the death of a defendant. Much like Weaver, the defendant
 10 in *Brooks* argued that *Kokesh*’s holding that disgorgement is a “penalty” for purposes of
 11 Section 2462 necessarily means that it is a “penalty” in the survivability context. *Id.* at
 12 *7. The *Brooks* court rejected that reasoning, holding that *Kokesh* “cannot be plucked
 13 from the statutory context that gives it force.” *Id.* at *8. The *Brooks* court noted that
 14 expanding *Kokesh* beyond its statutory context would require the court to ignore
 15 existing precedent and held that disgorgement was sufficiently “remedial” for
 16 abatement purposes. *Id.* Significantly, even in the wake of *Kokesh*, the *Brooks* court
 17 described disgorgement as “an equitable remedy...imposed not to punish, but to ensure
 18 illegal actions do not yield unwarranted enrichment.” *Id.* at *6 (emphasis added).

19 Likewise, courts facing similar circumstances have recognized—both before and
 20 after *Kokesh*—that the characterization of a remedy for purposes of Section 2462 does
 21 not control how that remedy is characterized for other purposes. For example, in *Krull*
 22 *v. SEC*, 248 F.3d 907, 914 & n.9 (9th Cir. 2001), the Ninth Circuit addressed whether
 23 the SEC’s one-year suspension of a registered securities representative was “remedial”
 24 or “punitive.” Like Weaver, the defendant in *Krull* argued that the remedy was punitive,
 25 relying on a case that deemed a similar suspension a “penalty” for purposes of Section
 26 2462. *Id.* The Ninth Circuit upheld the suspension, rejected the defendant’s reasoning,
 27 and noted that the case the defendant cited was “not persuasive” because it “only
 28 addressed whether the sanction imposed was a ‘penalty’ for the purposes of the statute

of limitations defined under [Section 2462].” *Id.* Similarly, the Eighth Circuit has expressed its understanding that the *Kokesh* holding does not change the equitable nature of the disgorgement remedy. In deciding whether injunctive relief is subject to the statute of limitations, the Eighth Circuit indicated that the lesson of *Kokesh* is that although “courts order SEC disgorgement as an exercise of their inherent equity power,” “disgorgement’s ‘equitable’ label does not exempt it from being a § 2462 penalty.” *SEC v. Collyard*, 2017 WL 2803184, *2 (8th Cir. June 29, 2017).

The reasoning of *Brooks*, *Krull* and *Collyard* applies here. *Kokesh*’s holding that disgorgement is “a § 2462 penalty,” *id.*, does not alter the equitable nature of the relief or this Court’s authority to order that a securities violator return his ill-gotten gains. This is especially true where expanding *Kokesh* beyond its statutory context would require this Court to discard decades of precedent. This Court should refuse Weaver’s invitation to abandon this well-established remedy.³

II. The SEC’s Approximation of Disgorgement Is Reasonable.

Once the *Kokesh* opinion is returned to its proper context, Weaver’s brief narrows the issues in dispute. Critically, Weaver does not dispute the accuracy of any of SEC Accountant Kevin Barrett’s calculations of Jammin Java sales proceeds and prejudgment interest. And, Weaver does not contest that: (1) entities he owned garnered \$22,812,154.19 from the unregistered (*i.e.*, illegal) sale of Jammin Java stock, and (2) Weaver received \$3,559,431 in cash derived from the sale of Jammin Java stock by entities owned by his co-Defendants. In other words, Weaver effectively concedes that

³ The Supreme Court’s disclaimer in *Kokesh* is dispositive. Moreover, Weaver’s underlying premise – that Congress has not weighed in on the disgorgement remedy – is incorrect. To the contrary, “Congress has expressly endorsed that sanction.” *SEC v. Palmisano*, 135 F.3d 860, 865 (2d Cir. 1998). In fact, Congress has repeatedly changed the statutory regime in a way that logically presupposes the existence of that remedy (and in some cases augments it). See, e.g., 15 U.S.C. § 78t-1(b)(2) (providing that defendants in insider trading cases may offset “[t]he total amount of damages” against “the amounts, if any, that such person may be required to disgorge” in enforcement actions); 15 U.S.C. §§ 77t(f), 78u(d)(4) (prohibiting “funds disgorged” in SEC enforcement actions from being used to pay attorney’s fees and expenses). Weaver’s reading of *Kokesh* would make numerous statutory provisions incoherent and meaningless, in derogation of the rule that a court’s role is “to make sense rather than nonsense out of the *corpus juris*.” *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

1 he received \$26,371,585.20 from the illegal, unregistered sale of Jammin Java stock. He
 2 thereby sets that amount as the floor for any disgorgement remedy.

3 While Weaver does not contest that he earned \$26 million from Jammin Java
 4 stock sales, he tries to chip away at other aspects of the SEC's approximation of his ill-
 5 gotten gains. Weaver argues that (a) the SEC's approximation includes purported
 6 "legitimate" profits, (b) he should not be held liable for amounts that he helped hide
 7 from regulators, and (c) cash balances for entities owned by his nominees should not be
 8 attributed to him. As the SEC has established, Weaver went to great lengths to obscure
 9 the money flow from his misconduct by using offshore shell companies, Swiss bank
 10 accounts, and nominees. (*See, e.g.*, Dkt. #173, SJ SOF ¶¶ 2, 7-24, 51, 63-67, 73-84, 86-
 11 97.) Weaver then perpetuated this ambiguity by (a) refusing to participate in discovery,
 12 (b) asserting his Fifth Amendment privilege, (c) using a pseudonym to avoid detection,
 13 and (d) instructing his agents to hide critical information from law enforcement. (*See,*
 14 *e.g.*, *Id.* at ¶¶ 80, 95; Dkt. #174-15 at 1, 5; Dkt. #222-2 at 152-153; Dkt. #222-3.) Now,
 15 he attempts to hide behind the very ambiguity he created. This Court is not required to
 16 indulge such a maneuver. Under the applicable standard, Weaver – not the SEC – must
 17 bear the risk of the uncertainty that springs from his misconduct.

18 A. **All of Weaver's Sale Proceeds Are Illicit Gains And Should Be Disgorged.**

19 Weaver argues that an undefined portion of his profits from Jammin Java trades
 20 were "legally...obtained" and, therefore, are not "wrongful gains." (Def. Br. at 12-13.)
 21 But, Weaver has no legitimate gains. Weaver ignores that the SEC prevailed on its
 22 claim that Weaver violated Securities Act Section 5. The SEC claimed – and this Court
 23 held – that Weaver's Jammin Java sales were unregistered (*i.e.*, illegal). (Dkt. #172 at
 24 17-19; Dkt. #215 at 5-6.) In other words, all of Weaver's profits from the unregistered
 25 sale of Jammin Java stock were derived from violations of federal securities law. Even
 26 without a finding of fraud, the proper remedy for Weaver's Section 5 violation is to
 27 disgorge the profits he earned from the illegal stock sales. *See, e.g.*, *Platforms Wireless*,
 28 617 F.3d at 1096-1098 (affirming disgorgement of all proceeds from defendants'

1 unregistered stock sales in violation of Section 5); *SEC v. M&A West, Inc.*, 538 F.3d
 2 1043, 1054 (9th Cir. 2008)(affirming district court order disgorging all profits related to
 3 Section 5 violation, including cash payments and “profits from [defendant’s] stock
 4 sales”); *SEC v. Schooler*, 106 F. Supp. 3d 1157, 1168-1169 (S.D. Cal. 2016)(holding
 5 that defendant violated Section 5 and – even without resolving the SEC’s fraud claim –
 6 disgorging \$136,654,250 of defendant’s profits from the unregistered sales). In short,
 7 the Section 5 charge alone warrants the requested disgorgement.

8 Contrary to Weaver’s suggestion, the SEC’s fraud claim provides a second basis
 9 for disgorgement of all of Weaver’s trading proceeds. The SEC successfully proved that
 10 Weaver participated in a fraudulent scheme to deceive investors into buying the huge
 11 (and otherwise unmarketable) blocks of Jammin Java stock that Weaver and his co-
 12 Defendants had amassed. As the Court found, Weaver “made millions of dollars in
 13 profit” by dumping his blocks of stock into the market that he helped artificially stoke
 14 with the fake Straight Path agreement.⁴ (Dkt. #215 at 7.) Weaver implies that the SEC is
 15 required to parse the market effects of intervening promotional activity – effectively
 16 requiring the SEC to prove that Weaver’s contribution to the scheme was the proximate
 17 cause of all of his profits. (Def. Br. at 13.) That gets the standard backwards. The SEC
 18 need only make a reasonable approximation of Weaver’s gains and establish “but-for”
 19 causation between Weaver’s conduct and his profits. *See, e.g., SEC v. Teo*, 746 F.3d 90,
 20 101-107 (3d Cir. 2014). It is then Weaver’s burden to establish that intervening events
 21 should lessen his liability. *Teo*, 746 F.3d at 107. Even then, “evidence of an intervening
 22 cause...is not dispositive.” *Id.* “The policies underlying the disgorgement remedy –
 23 deterrence and preventing unjust enrichment – must always weigh heavily in a court’s
 24 consideration of whether particular profits are legally attributable to the wrongdoing.”

25
 26 ⁴ Weaver’s reliance on the SEC’s expert report is unavailing. The SEC’s expert was not retained to
 27 identify Weaver’s gains. Rather, the SEC’s expert was hired to opine on whether Weaver’s
 28 contribution to the scheme – the fake Straight Path agreement – could be considered material by a
 reasonable investor in deciding to buy “an extremely small, thinly traded and not widely followed”
 stock like Jammin Java. (Dkt. #226-5 at 4, “Scope of Assignment.”) The SEC’s expert – and, later, the
 Court – concluded that Weaver’s conduct was significant enough to deceive investors.

1 *Id.* Here, the SEC has shown – through undisputed evidence – that the market for
 2 Jammin Java stock did not exist until Weaver engineered the fake Straight Path
 3 agreement. (*See, e.g.*, Dkt. #173, SJ SOF ¶ 62.) But for Weaver’s fraud, there was no
 4 way for him (and his nominees) to dump their shares on the unsuspecting public.
 5 Having participated in a scheme to manipulate Jammin Java stock, Weaver should not
 6 be allowed to retain any of the resulting profits.

7 **B. Weaver Should Be Held Liable For Proceeds That He Helped Hide From
 8 Law Enforcement and That Were Held By Nominee-owned Entities.**

9 Weaver’s attempts to chip away at the SEC’s approximation of his ill-gotten
 10 gains are divorced from the applicable standard. Tellingly, Weaver fails to mention that,
 11 in determining disgorgement (1) “any risk of uncertainty should fall on the wrongdoer
 12 whose illegal conduct created the uncertainty” and (2) a “person who controls the
 13 distribution of illegally obtained funds is liable for the funds he or she dissipated as well
 14 as the funds he or she retained.” *Platforms Wireless*, 617 F.3d at 1096-1098. Turning
 15 that standard on its head, Weaver effectively argues that remaining ambiguities and
 16 unanswered questions regarding the disposition of some of the illicit Jammin Java
 17 profits should be resolved in his favor. He also disregards that his assertion of the Fifth
 18 Amendment privilege warrants an adverse inference against him.

19 Critically, Weaver has never refuted the SEC’s evidence that (1) he directed
 20 Defendant Al-Barwani to transfer \$2 million of Jammin Java proceeds into gold
 21 Kruggerrand (and decided the amount and timing of the transfer); (2) Weaver directed
 22 Al-Barwani to execute documents creating the Tare Finance entity that received \$11.3
 23 million of illicit profits, (3) Weaver was referred by Berlinger (his nominee) to
 24 Benjamin Altun – the fiduciary who formed Tare Finance in Dubai, (4) Berlinger
 25 (Weaver’s nominee) transferred the \$11.3 million (although he cannot identify who
 26 gave the instruction), (5) Berlinger testified that Weaver was concerned that Swiss
 27 regulators would freeze profits, wanted to get money out of the Swiss banking system,
 28 and participated in the formation of Dubai-based Tare Finance to “get out of

1 Switzerland,” and (6) Al-Barwani, Sun, and Berlinger acted as Weaver’s nominees and
2 followed his directions.⁵ (Dkt. #221 at 13-17.) In short, while the ultimate disposition of
3 some of the Jammin Java profits is unclear, the SEC has provided unrefuted evidence
4 that Weaver helped orchestrate the transfer of \$13.3 million in illegal profits out of the
5 Swiss banking system and that he exercised control over his nominees.

6 Unable to deny his involvement, Weaver relies on the ambiguity regarding the
7 ultimate recipient, citing the fact that Weaver’s nominees (Berlinger and Al-Barwani)
8 are not sure where the gold and Tare Finance funds went. (Def. Br. at 10-11.) In other
9 words, Weaver tries to dodge liability by hiding behind the opaque financial structures
10 that he helped build using multiple layers of shell companies, Swiss bank accounts and
11 nominees. He used this structure to mask the true owner of Jammin Java proceeds,
12 refused to provide any information during litigation regarding the flow of funds,
13 actively hid information from Swiss regulators and now, incredibly, faults the SEC for
14 not tracing all of the illicit Jammin Java profits into his hands. But, in the face of
15 evidence of Weaver’s role in his nominees’ transactions, it was Weaver’s burden to
16 address the uncertainty stemming from his conduct. Critically, Weaver does nothing to
17 actually shed light on where this money went or address the ambiguities created by his
18 web of offshore shells and nominees. Consequently, he should be held liable for the
19 money that he helped hide and the net balances held by the nominee-owned shell
20 companies that the SEC has identified.⁶

21 **III. A Maximum Civil Penalty Equal To Disgorgement Is Warranted.**

22 In addition to chipping away at the SEC’s approximation of his gains, Weaver

23

24 ⁵ Weaver does dispute that he controlled transactions for one of Defendant Miller’s entities – Las
25 Colinas. (Def. Br. at 11.) Unlike his co-Defendants – who implicated Weaver – Miller pled the Fifth
26 and did not produce documents. Even so, the SEC presented evidence that Weaver directed Jammin
Java transactions out of Miller’s entities. (Dkt. #173, SJ SOF ¶ 96.)

27 ⁶ Weaver suggests that the SEC seeks disgorgement of profits that Defendant Sun claims to own and
28 control. (Def. Br. at 11.) That is incorrect. As explained in the SEC’s initial brief, all profits sent to the
personal accounts of Weaver’s nominees were excluded from the calculation of Weaver’s gains. (Dkt.
#221 at 16.) Specifically, the SEC excluded the Lebanese account that Sun identified in his deposition.

1 argues that he should pay a civil penalty on a “per-violation” basis – resulting in a
2 penalty of only \$300,000. (Def. Br. at 4, 6-8.) On its face, Weaver’s proposed penalty is
3 absurd given the severity of his misconduct and the massive profits he derived from it.
4 As described in detail in the SEC’s opening brief, (Dkt. #221 at 3-4), Weaver’s
5 violations were egregious in sheer size and were executed with sophistication and a
6 high level of subterfuge (including deliberate efforts to hide his fraud from law
7 enforcement after the fact). Weaver has not acknowledged wrongdoing or given any
8 assurances that his misconduct will stop. In sum, as shown in the SEC’s initial brief, all
9 applicable factors weigh in favor of a substantial civil penalty.⁷ (Dkt. #221 at 3-7, 18.)

10 The “per violation” approach is particularly ill-fitting in this case given Weaver’s
11 position that he should pay no disgorgement. Weaver argues that he should be allowed
12 to keep his ill-gotten profits – including \$26 million that he does not contest went to his
13 entities and personal accounts. Yet, he simultaneously argues that a civil penalty pegged
14 to those gains is inappropriate. Distilled to its essence, Weaver’s brief asks the Court to
15 allow him to keep tens of millions of dollars that he reaped from violating federal
16 securities law and limit a penalty to \$300,000 – a veritable rounding error in this
17 context. Such an approach is grossly inadequate. The SEC respectfully requests that the
18 Court enter a civil penalty that reflects the severity of Weaver’s conduct. Here, the “per-
19 violation” approach does not qualify.

20 **IV. The SEC’s Proposed Civil Penalty Does Not Violate The Eighth Amendment.**

21 Confronted with overwhelming, unrefuted evidence of his fraud and his massive
22 unregistered sale of Jammin Java stock, Weaver gamely tries to use the sheer size of the
23 Jammin Java scheme to his advantage. He claims that the proposed penalty – tied to his
24 ill-gotten gains – is an “excessive fine” within the meaning of the Eighth Amendment.
25 (Def. Br. at 15.) At the outset, Weaver tries to lump the SEC’s proposed disgorgement
26 into his Eighth Amendment argument, citing the SEC’s request for \$104 million in

27 28 ⁷ For the same reasons, the SEC has met the standard for a permanent injunction and permanent penny
stock bar. (See Dkt #221 at 3-8.)

1 “disgorgement, penalties and prejudgment interest.” (Def. Br. at 16.) But, disgorgement
2 is not “punishment” within the meaning of the Eighth Amendment. *See, e.g., SEC v.*
3 *Spongetech Delivery Sys., Inc.*, 2015 WL 5793303, *5 (E.D.N.Y. Sept. 30, 2015).

4 More to the point, Weaver does not – and cannot – cite a single case involving an
5 SEC enforcement action where a penalty equal to the defendant’s pecuniary gain was
6 deemed to violate the Eighth Amendment. A civil penalty violates the Excessive Fine
7 Clause only if it is “grossly disproportional” to the gravity of the violation. *U.S. v.*
8 *Bajakajian*, 524 U.S. 321, 336-37 (1998). “[J]udgments about the appropriate
9 punishment for an offense belong in the first instance to the legislature.” *Id.* Here, the
10 SEC’s proposed penalty is permitted by statute, 15 U.S.C. § 78u(3)(B)(iii). And, that
11 statute ensures proportional relief by tying the penalty to Weaver’s pecuniary gain. *See,*
12 *e.g., SEC v. Brookstreet Sec. Corp.*, 664 Fed. Appx. 654, 657 (9th Cir. 2016)(finding a
13 \$5.88 million penalty does not violate the Excessive Fines Clause “[e]ven if we
14 assume” that the security at issue caused only \$2 million in investor losses); *SEC v. Bic*
15 *Real Estate Dev. Corp.*, 2017 WL 1740136, *7 (N.D. Cal. May 4, 2017)(holding that
16 penalty equal to defendant’s profit did not violate the Eighth Amendment). To be sure,
17 the penalty requested by the SEC is substantial. But, the penalty is high because
18 Weaver’s misconduct was so immensely profitable. The manipulation at issue resulted
19 in over \$77.6 million in profits for Weaver and his co-Defendants. Even Weaver does
20 not contest that \$26 million of those sales proceeds went to his entities and personal
21 accounts. That money did not come from thin air. It was taken from investors on the
22 other side of the illegal Jammin Java sales. Had Weaver pilfered less money from the
23 investing public, the penalty would be lower.⁸ Weaver has only himself to blame for the
24 size of the available statutory remedy.

25 Perhaps realizing this, Weaver attacks the amount of the requested penalty as
26 violating the Excessive Fines Clause by pointing the finger at other Defendants and

27
28 ⁸ Contrary to Weaver’s suggestion, the SEC does not seek a civil penalty that exceeds his gains. The
SEC is seeking a statutory penalty equal to the amount this Court orders in disgorgement.

1 comparing the proposed financial relief to prior settlements in this case. But, the
2 SEC's settlements with other Defendants have no relation to the question at hand:
3 what is the appropriate relief given Weaver's conduct and Weaver's gains? The
4 answer to that question should be tied to the facts and evidence submitted in this
5 litigation; Weaver's analysis of the SEC's settlements with other parties is irrelevant.
6 *U.S. v. Emerson*, 107 F.3d 77, 81 n.9 (1st Cir. 1997) ("the proportionality concern in
7 an excessive fines case is generally considered to be a question of whether the fine
8 imposed is disproportionate to the crime committed...not whether a given fine is
9 disproportionate to other fines imposed on other defendants") (internal quotation
10 omitted). Even so, such an analysis would not benefit Weaver. In deciding to
11 compromise its claims, the SEC weighed several factors that undermine Weaver's
12 request for equal treatment. For example, (a) documentary evidence confirmed that
13 Weaver profited from the illegal sales to a far greater extent than his co-Defendants,
14 (b) aside from Miller and Whittle, Weaver's co-Defendants participated in discovery
15 and testified under oath, (c) the documents they produced and testimony they
16 provided implicated Weaver, (d) extensive evidence indicated that Weaver's co-
17 Defendants were acting at Weaver's direction, and (e) two of Weaver's co-
18 Defendants entered into formal cooperation agreements with the SEC. The requested
19 remedies against Weaver reflect the undisputed evidence of Weaver's conduct, his
20 central role in the scheme, and the enormous profits he reaped. His attempt to point
21 the finger at his co-Defendants does not change any of that.

22 CONCLUSION

23 For the foregoing reasons, the SEC respectfully requests that the Court grant the
24 SEC's motion for injunctive and monetary relief.

25
26 Dated: August 24, 2017

Respectfully submitted,

27 /s/ Timothy S. Leiman
28 Timothy S. Leiman

1 U.S. Securities and Exchange Commission
2 Chicago Regional Office
3 175 W. Jackson Blvd., Suite 1450
4 Chicago, Illinois 60604
5 Telephone: (312) 353-5213
6 Fax: (312) 353-7398
leiman@sec.gov

7 **CERTIFICATE OF SERVICE**

8 Timothy S. Leiman hereby certifies that he caused the foregoing document to
9 be filed through the Court's CM/ECF system on August 24, 2017, which
10 automatically sends an electronic copy of the document to all counsel of record.

11 /s/ Timothy S. Leiman

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28